No. 21,372

United States Court of Appeals

For the Ninth Circuit

HENRY JACOBOWITZ,
Appellant,

vs.

DOUBLE SEVEN CORPORATION,
Appellee.

On Appeal from the United States District Court for the District of Arizona

APPELLANT'S OPENING BRIEF

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Subject Index

Table of Authorities Cited

Statutes

Texts

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STATEMENT OF JURISDICTION

This is an appeal by an attorney for a bankruptcy trustee from an Order of a bankruptcy Referee—as affirmed by a District Court—setting his fee for legal services rendered to the trustee in the course of administering a bankruptcy estate.

The Referee's jurisdiction to set the fee rests on §38(6), 11 U.S.C. §66, of the Bankruptcy Act.

The District Court's jurisdiction to review the Order of the Referee rests on §39c, 11 U.S.C. §67, of the Bankruptcy Act.

This Court's jurisdiction rests on §24a, 11 U.S.C. §47, of the Bankruptcy Act.

STATEMENT OF THE CASE

On September 17, 1965, almost three and one-half years after his appointment as counsel for the bankruptcy trustee, appellant was awarded a fee of $7,500.00 out of a requested fee of $11,410.00. Significantly, the Referee found that the requested fee was a reasonable one, based upon the value of legal services in this locality when rendered in ordinary civil proceedings, but concluded that since a totally different standard applies in bankruptcy proceedings, the fee should be only $7,500.00 (T.R. 23-24).[1]

On September 17, 1965, appellant filed with the District Court an informal application for a reconsideration of the fee (T.R. 1-3). On October 6, 1965, it was summarily denied (T.R. 17).

On November 8, 1965, on the formal Petition for Review (T.R. 20), the Order of the Referee was reversed and the fee was allowed in the amount prayed for (T.R. 161).[2]

On November 23, 1965, the Order of the District Court dated November 8, 1965, reversing the Order of the Referee, was vacated and the matter was transferred to the Honorable C. A. Muecke (T.R. 162), the Judge who had previously denied appellant's application for a reconsideration of the fee.

On December 13, 1965, on motion of the appellant (T.R. 163), the matter was remanded to the Referee

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[1]See, Appendix, p. i.

[2]See, Appendix, p. iii.

for the purpose of hearing additional testimony "touching upon the reasonableness of the fee".

Such testimony was heard by the Referee on January 14, 1966,[3] and thereafter, by an Order dated June 29, 1966, he set the fee once again at $7,500.00 (T.R. 166-169).[4]

On review of this Order, on August 23, 1966, the District Court, while deleting the criterion that led the Referee to reduce appellant's fee from $11,410.00 to $7,500.00, nevertheless affirmed the award of the Referee (T.R. 170).[5]

On September 9, 1966, appellant perfected this appeal (T.R. 171).

The principal issues before this Court are:

1. Is it an abuse of discretion to award an attorney for the bankruptcy trustee a fee which is admittedly less than fair and reasonable simply and solely because his services were rendered in a bankruptcy proceeding?

2. Is it an abuse of discretion to use abstract statistics, not part of the record, as the sole and controlling criterion in determining what is a fair and reasonable fee under the circumstances of a particular case?

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[3]The transcript of this hearing is part of the record. Reference to said transcript will herein be designated by "T.P."

[4]See, Appendix, p. iv.

[5]See, Appendix, p. ix.

SPECIFICATIONS OF ERRORS

1. The Referee and the Distict Court erred in awarding appellant a fee that is admittedly less than fair and reasonable simply and solely because his services were rendered to a bankruptcy trustee in a bankruptcy proceeding.

2. The Referee and the District Court erred in awarding appellant a fee that is less than fair and reasonable in the light of the minimum rates prescribed by the local Bar Association, although the services were admittedly exceptional.

3. The Referee and the District Court erred in awarding appellant a fee that is less than fair and reasonable under settled bankruptcy principles.

4. The Referee and the District Court erred in permitting abstract and unverified statistics, not part of the record, to be the controlling criterion in determining the quantum of appellant's fee.

SUMMARY OF ARGUMENT

1. All authorities agree that an attorney for a bankruptcy trustee is entitled to a fair and reasonable fee for necessary professional services competently rendered.

The fee allowed herein, as we shall demonstrate, is grossly unfair and unreasonable under any judicially accepted criterion.

2. Liquidating bankruptcy estates, as distinguished from Chapter X and XI estates, are administered

strictly for creditors, i.e., not for debtors or specialty groups. Such creditors, as a rule, are more interested in paying an attorney a reasonable compensation for services competently rendered than in paying a meager compensation for mediocre services rendered.

In this case the services rendered by appellant have, as everyone agrees, greatly enhanced the assets of the estate. Consequently, the creditors affirmatively urged the Referee to allow the fee as requested. Logic and good sense dictate that the request of those at whose expense a fee is paid should be honored.

3. The use of irrelevant and abstract statistics to determine fees in bankruptcy proceedings—as was done here—without taking into consideration the many elements that go into the making up of a fair and reasonable fee is a clear violation of the mandate of this Court—and all appellate courts—which requires that a Referee use judicial discretion in setting such a fee. Statistics cannot be substituted for judicial discretion.

ARGUMENT

I. AN ATTORNEY FOR A BANKRUPTCY TRUSTEE IS ENTITLED TO A FEE THAT IS FAIR AND REASONABLE UNDER THE CIRCUMSTANCES OF THE PARTICULAR CASE, AND SUCH FEE NEED NOT BE LESS THAN WHAT WOULD BE GENERALLY AGREED IS REASONABLE FOR THE SAME OR SIMILAR SERVICES OUTSIDE OF BANKRUPTCY.

It is ironic that appellant, after having successfully fought the battles of his clients—the creditors—should be put to the task of battling once again, but this time

for the fruits of his efforts, i.e., for a just and fair fee for admittedly unselfish and productive services.

The irony is that this is not the typical case where the Referee has questioned the veracity of the attorney for the bankruptcy trustee, his ability in this field of the law, or the results which he achieved for the estate; nor is this a case where the creditors—or indeed a single one of them—were unhappy with the services rendered or the fee requested. To the contrary, the Referee acknowledges that the services rendered by appellant were ably and efficiently performed under most trying circumstances and that his efforts greatly enhanced the assets of the estate.[6]

As to the fee as prayed for, the trustee—himself an attorney and an experienced bankruptcy practitioner—testified that it is reasonable[7] and recommended that it be allowed.[8] The creditors, represented by a Creditors' Committee comprised of able and reputable local counsel, also thought the fee to be fair and reasonable and affirmatively urged the allowance thereof.[9] The expert witnesses opined that it is most reasonable, and in fact, on the low side.[10]

It also should be noted that the fee requested by appellant is not one which he would command in private employment. As Mr. Warner, a general practitioner, testified, a reasonable fee for the services

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[6]Referee's Findings of Fact Nos. 1 and 2, Appendix, pp. iv-v.
[7]Referee's Finding of Fact No. 3, Appendix, p. v.
[8]T.P. 48.
[9]Referee's Finding of Fact No. 4, Appendix, p. vi.
[10]Referee's Finding of Fact No. 5, Appendix, p. vi.

rendered by appellant in the four plenary actions alone would be in the area of $12,000.00 to $15,000.00.[11] According to appellant's testimony, his customary fee for services of this nature, in his private practice, is a minimum hourly rate of $35.00, with an adjustment upward if the results of the employment prove to be of special benefit to the client.[12] Moreover, even the Referee concedes that a higher fee than the one requested by appellant would be justified, if his services were rendered in private employment.[13]

Finally, even from a bankruptcy point of view, the uncontroverted testimony of two eminent counsel of this area, Messrs. Stockton and Perry—representing almost one hundred years of experience—is that a fee of $15,000.00, and upward, easily would be justified herein.[14] In contrast, the fee requested by appellant is only $11,410.00, and is based simply upon the *minimum fee schedule* of the Maricopa County Bar Association, i.e., at the rate of $30.00 per hour or $250.00 per day in Court, although the results achieved herein—said to be the ultimate test—would unquestionably warrant compensation beyond that of the minimum rate.

It is settled that fees for the trustee's attorney are allowable as an expense of administration under Section 62 of the Bankruptcy Act (11 U.S.C.A. §102). *In re Owl Drug Co.* (1936), 16 F.Supp. 139 (D.C.

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[11]T.P. 15.
[12]T.P. 50-51.
[13]T.P. 62.
[14]Referee's Finding of Fact No. 5, Appendix, p. vi.

Nev.), affirmed sub nom. *Cohen v. Elder,* 9 Cir., 90 F.2d 823. While the Act itself does not prescribe an objective criterion for determining the quantum of the fee, all authorities agree that it should be fair and reasonable under the circumstances of the particular case, and that such determination is left to the sound judicial discretion of the Bankruptcy Court. *In re Barceloux* (1935), 9 Cir., 74 F.2d 288; *In re Owl Drug Co.,* supra; *Sampsell v. Monell* (1947), 9 Cir., 162 F.2d 4; 3 *Collier on Bankruptcy,* 14th Ed., Sec. 62.12 [4] & [5]; 6 *Remington on Bankruptcy,* 5th Ed., Sections 2672 & 2673.

In commenting upon the special nature of this discretionary power, the Court, in *In re Owl Drug Co.,* supra, explained:

> ". . . But this power 'is not discretionary in the sense that the courts are at liberty to give *anything more* than a fair and reasonable compensation.' Brewer, C. J. in Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C.C. Mo. 1887), 32 F. 187, 188. And because extravagant costs of bankruptcy administration have been recognized as a 'crying evil' (Realty Associates Securities Corporation v. O'Connor (1935) 295 U.S. 295, 299, 55 S.Ct. 663, 79 L. Ed. 1446), judges have been warned by the Supreme Court against vicarious generosity in these matters. In re Gilbert (1928) 276 U.S. 294, 296, 48 S.Ct. 309, 72 L.Ed. 580." 16 F.Supp. 139, 142.

What, then, are the ingredients or the elements of a *fair and reasonable fee* for the services of an attorney for the bankruptcy trustee within the framework of

the Act? This Court has held, in the leading case of *In re Barceloux,* supra, that in determining such a fee it is necessary that the following elements be considered, to-wit:

> ". . . [1] the time spent, [2] the intricacy of the questions involved, [3] the size of the estate, [4] the opposition encountered, [5] the results achieved, [6] the opinion evidence touching the reasonableness of the fee, and [7] the economical spirit of the Bankruptcy Act itself (11 USCA)." 74 F.2d 288, 294.

It is readily apparent that these elements, except the last one dealing with the intangible economical spirit of the Bankruptcy Act, are the same as those which are employed in the determination of a fair and reasonable attorney's fee generally. Cf. *Monaghan v. Hill* (1944), 9 Cir., 140 F.2d 31; Canon 12 of the Canons of Ethics of the American Bar Association; 7 *Am.Jur.*2d, Attorneys at Law, Secs. 235-247; and 56 A.L.R.2d 13, 18-48.

Before discussing the legal effect and the appropriate application of the last element, that is, the economical spirit of the Act, it is important to note that this Court has included "the opinion evidence touching the reasonableness of the fee" as one of the requisite elements. On this point, all experts who testified agreed that the fee requested by appellant is extremely reasonable and indeed on the low side.[15]

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[15]Referee's Finding of Fact No. 5, Appendix, p. vi.

Then, what effect does this unique element, the economical spirit of the Act, have upon the "fair and reasonable" criterion so often used in relation to fixing the quantum of attorney's fees generally? Some authorities argue that it modifies that criterion so as to mean *something less than fees which would ordinarily be charged to private clients,* but they hasten to add, *not too much less.* As one Referee recently put it:

> "In a nutshell, therefore, the quantum of the fee to be awarded in this case is in my discretion subject to the limitation that the fee be 'reasonable'; by the term 'reasonable' is meant a fee less than that which would be received from a private client and yet not so much less that abler members of the bar will be driven from the field." *In re Seed Marketing Association* (1964), 228 F. Supp. 812, 820 (D.C. Neb.)

At the same time, the National Conference of Referees in Bankruptcy—speaking for all Referees—strongly refutes this in its entirety. Said the Conference in its recent Editorial entitled "Bankruptcy Statistics and the Costs of Administration", to-wit:

> "*. . . It is frequently asserted that economy is the touchstone of bankruptcy administration but it is difficult to perceive any convincing reason why attorneys should be expected to be content with less compensation for genuine legal services, competently performed, because they are rendered in a bankruptcy case, than would be generally agreed is reasonable for the same or similar services outside of bankruptcy.*" 39 *Referees Journal* 34, April, 1965. (Emphasis supplied).

While there is no unanimity as to the precise meaning of the so-called "economical spirit of the Act", or of its intended effect, both the commentators and the recent decisions are in favor of curtailing rather than broadening its application.

As is said by *Remington:*

> *"It is easy to overdo the principle of 'economy of administration' by cutting down well-earned attorney's fees below what is adequate to procure talented service, thus discouraging careful investigation and able preparation and limiting bankruptcy practice to inferior attorneys. Frauds, concealments, falsehoods, and preferences are accomplished in such devious and complicated ways, and the bad bankrupt and his accomplices are so resourceful in their cunning, that ordinary lawsuits elsewhere require correspondingly less preparation and time than does almost any bankrupt estate for its adequate protection. Nothing plays more insidiously into the hands of bankruptcy schemers than propagation of the motion that the ruling test for bankruptcy litigation should be 'Will it pay?' Right bankruptcy litigation, like other right litigation, is a fight, not a bargain, a fight for the vindication of pure business morals, with all that that implies for the ultimate betterment of the credit world—and there can be no monetary valuation fixed upon any one contest. None of them 'pay', obviously, where the trustee is slothful or under improper influence and the individual creditor has to carry on the fight at his own expense; but the way to make bankruptcy litigation 'pay' is to choose vigorous trustees and support them and their attorneys in the struggle*

to make bankruptcy administration pure at whatever cost may be necessary." 6 *Remington on Bankruptcy,* 5th Ed., Section 2682, pp. 228-229. (Emphasis supplied).

Collier is to the same effect, to-wit:

"*Economy* is the most important principle, as has been repeatedly stressed by the United States Supreme Court. As any other category of administrative expenses, fees for an officer's attorney are governed by 'the economical spirit of the Bankruptcy Act.' *However, 'economical' is by no means synonymous with 'parsimonious' and should not exclude a compensation that is under all the circumstances of the case fair and reasonable. To reserve as much as possible for distribution to the creditors is one postulate, but there is another, perfectly compatible with the former, not to discourage needlessly able and competent lawyers from accepting a retainer in bankruptcy by denying them reasonable remuneration. A misunderstood economy in this respect may lead to evils far greater than the sacrifice imposed on the individual creditor by reason of an equitable allowance for meritorious and diligent counsel."* 3 *Collier on Bankruptcy,* 14th Ed., Sec. 62.12[5], pp. 1488-1489. (Emphasis supplied).

The recent cases readily accept this reasoning:

"That spirit must be respected, but should not be stressed to the extent of driving the abler members of the bar out of the field, where their services may often be of great value to general creditors, as in this case." *In re Belfort Corp.,* 136 F.Supp. 1, 4-5 (D.C. Mo. 1955).

More recently a reviewing District Court said:

> "As a final thought, we would like to mention the fact that it is important to the creditors, the Trustee, the bankrupt, the Referee, and the public in general, that competent attorneys be attracted to do the work of attorney for the Trustee in Bankruptcy. While the fees which are awarded to these men must be liberally sprinkled with the economical spirit of the Bankruptcy Act and the parallel idea that attorneys can't expect the same type of compensation as might be charged to a private client, the fact still remains that competent attorneys deserve to be compensated in a fashion which would justify their bringing this wealth of experience and knowledge to the Bankruptcy Court. *The Courts must recognize that these men must be adequately and fairly compensated if they are to be expected to lend their skill and talent to this area of the law.*" *In re Seed Marketing Association* (1964), supra, page 813. (Emphasis supplied).

While everyone agrees that economy in the administration of bankruptcy cases is a highly desirable concept and that it should be encouraged, yet, as all authorities warn, the doctrine should not be overemphasized to such an extent as to deprive the bankruptcy practitioner of a fair and reasonable compensation. As the Court said in *In re Owl Drug Co.,* supra:

> " 'The workman is worthy of his meat.' Matthew X:10. Skilled attorneys are entitled to the fair value of their services."

* * * * *

> "'. . . For exacting labor done, weighty responsibilities assumed, and great results accomplished, we would deal out compensation with liberal hand.'"

Also, the old adage, "You have to spend money to make money" is said to apply to bankruptcy proceedings as well. 39 *Referees Journal,* supra.

The Referee, in setting appellant's fee, admittedly used the criterion that an attorney for a bankruptcy trustee should *always* be compensated *"appreciably less* than he could command for similar services in purely private employment."[16] He predicates this legal conclusion upon three Chapter X cases[17] which, upon close analysis, do not support such conclusion. *In re Standard Gas & Electric Co.* (1939), 3 Cir., 106 F.2d 215, 216-217; *In re Mt. Forest Fur Farms of America* (1946), 6 Cir., 157 F.2d 640, 647; and *Finn v. Childs Co.* (1950), 2 Cir., 181 F.2d 431, 435-436.[18] A reading of these cases will show that they simply state the proposition that attorneys in reorganization proceed-

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[16]Referee's Conclusion of Law No. III (Emphasis supplied), Appendix, p. vii.

[17]T.P. 53-56.

[18]". . . *But in a reorganization proceeding, where the lawyers look for compensation to the debtor's estate which may belong, in equity, largely to others than those who have requested their services, they should have in mind the fact that the total aggregate of fees must bear some reasonable relation to the estate's value. Under these circumstances they cannot always expect to be compensated at the same rate as in litigation of the usual kind.* In re Standard Gas & Electric Co., 3 Cir., 106 F.2d 215, 216-217; In re Mt. Forest Fur Farms of America, 6 Cir., 157 F.2d 640, 647; London v. Snyder, 8 Cir., 163 F.2d 621." (Emphasis supplied.)

ings *cannot always expect* to be compensated in the same manner as if they had rendered their services under purely private employment. This, of course, is markedly different from the criterion used by the Referee, i.e., that the compensation should *always be appreciably less.*

Moreover, the rule espoused by these three decisions has no application to the case at bar because: (1) Appellant does not seek the same compensation that he would command under private employment; and (2) he is, in fact, the legal representative of *all creditors*—not only of certain factions, as is usually the case in reorganization proceedings—having been selected as such, with the approval of the Bankruptcy Court, by a bankruptcy trustee who was nominated and elected by *all the creditors of this estate.*

There are, of course, other distinguishing factors between Chapter X cases and ordinary liquidating cases. In the former, usually substantial asset cases, which assets are voluntarily surrendered to the trustee in an orderly fashion, an attorney's fee is not necessarily dependent upon his bringing additional assets into the estate; while in the latter, where assets are usually scarce, or have been concealed or preferentially transferred—as was done in this case—his fee, if any, is dependent in main upon the extent by which the assets of the estate have been enhanced as the result of his efforts. In brief, the fee of an attorney in Chapter X cases is not totally dependent on his success, while in a liquidating case it is admittedly inherently contingent. Cf. *In re Barceloux,* supra.

Also, the ever-present danger that the allowance of fees of the many attorneys who invariably are involved in a Chapter X case, i.e., attorneys for the stockholders' committee, attorneys for the bondholders' committee, attorneys for the debtor corporation, attorneys for the trustee, et al., in their aggregate amount may ruin or endanger the success of the reorganization plan is nonexistent in this or in any other liquidating case.

And last but not least, the Referee's basic premise that the attorney for the trustee in a liquidating bankruptcy represents the bankrupt, and hence a pauper, is unquestionably erroneous (T.P. 61). As Referee William J. Rudin of the Eastern District of New York points out in Footnote No. 2 to his article found in *XXXIV Fordham Law Review* 387 (1966):

> "2. Charles Elihu Nadler, a noted authority on bankruptcy administration, has argued that it should not be the attorneys who feel the bite of the spirit of economy. He noted that the rationale behind this spirit of economy is that, if less is paid to the attorneys, more will be available for distribution to creditors. However, it was pointed out that what the courts fail to realize is that it is not the attorneys who are responsible for the poor financial condition of the bankrupt or debtor. If anyone at all is at fault, then that blame must fall upon the creditors (whose careless or negligent extensions of credit created the difficulty), and, therefore, they should rightfully bear the brunt of the costs in the administration. Finally, Nadler predicated that, if the courts persist in their parsimonious attitude, then the cap-

able and respected attorneys will be forced to abandon bankruptcy practice altogether. Nadler, Fallacies in Judicial Attitudes Towards Legal Fees in Bankruptcy, 58 Com. L.J. 305, 307-08 (1953)."

II. ABSTRACT STATISTICS CANNOT SUPPLANT JUDICIAL DISCRETION IN DETERMINING WHAT IS A FAIR AND REASONABLE FEE UNDER THE CIRCUMSTANCES OF A PARTICULAR CASE.

The Referee attributed much weight to certain national averages, with which appellant is not familiar, for they are not part of this record.[19] Assuming the accuracy of these averages, they are simply averages, and consequently cannot and ought not control the ultimate decision herein. There are, indeed, many $60,000.00 cases which can be administered for much less than the national average recited by the Referee, and there are, on the other hand, many cases which cannot be effectively administered at that rate. This is precisely why all knowledgeable authorities stress the fact that each award should be governed by the particular circumstances of the individual case. See, 3 *Collier on Bankruptcy,* Section 62.12[5].

Statistics of course play an important part in our modern way of life. They are not, however, to be used arbitrarily and indiscriminately, and there are instances when they serve little, if any, useful purpose. This is one of those instances, for the reasons so eloquently stated in the previously mentioned Editorial

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[19]Referee's Finding of Fact No. 7, Appendix, p. vi.

of the National Association of Referees entitled "Bankruptcy Statistics and the Costs of Administration", to-wit:

> "More importantly, the statistics do not show *how* the assets came into the estate. In some cases the trustee may find a bird nest on the ground by way of deposits in the bank or easily collectible accounts receivable. Collection of these assets should result in little or no expense.
>
> "On the other hand in order to bring in money or property improperly distributed on the eve of bankruptcy the trustee and his attorneys may have to mine the hard rock, employing accountants and spending days in time consuming Section 21a hearings to get the facts and then prosecuting to a conclusion plenary suits or summary proceedings. All this adds to the expense and raises the percentage costs of administration but is fully justified if it vindicates the Bankruptcy Act and brings assets into the estate." 39 *Referees Journal* 34, April, 1965. (Emphasis supplied).

While no useful purpose would be served by an exhaustive list or analysis of previous decisions on this subject, a few, however, should be briefly alluded to so as to show that the fee requested herein, $11,400.00 out of an estate of $61,269.15, is modest indeed in contrast to those which have been previously allowed and approved.

> A fee of $23,000.00 was awarded to the attorney for the trustee in an estate of $71,200.00, in *In re Belfort* (1955) supra.
>
> More recently, in 1964, in *In re Seed Marketing Association,* supra, *a parallel to the case at bar,*

a handsome fee of $18,500.00 (29% of the assets) as allowed by the Referee, was increased by the reviewing District Court to $25,731.00 (40% of the assets) in an estate of $64,204.00.

Other cases worthy of brief mention are, to-wit:

An allowance of $9,750.00 by the Referee in an estate of $31,021.00, over the objection of the unsecured creditors, was affirmed on review and on appeal in *Kimm v. Brecke* (1942), 8 Cir., 130 F. 2d 687.

A fee of $7,500.00 for a recovery of $21,500.00 was approved by the U. S. Supreme Court in *Watkins v. Sedberry* (1923), 261 U.S. 571, 43 S. Ct. 411, 414, 67 L.Ed. 802.

An allowance by the Referee of $5,000.00 for a recovery of $8,700 was approved in *Levin v. Barker* (1941), 8 Cir., 122 F.2d 969, Cert. den.

An allowance of $7,500.00 was granted to the trustee's attorney for obtaining the rejection of $65,000.00 of general unsecured claims and the conversion of $13,000.00 of preferred claims to unsecured claims in *In re Independent Distillers of Kentucky* (1940), 34 F.Supp. 708 (D.C. Ky.).

An allowance of $6,750.00 was held not excessive for the recovery of $18,000.00 in *Hammer v. Tuffy* (1944), 2 Cir., 145 F.2d 447.

An interim allowance of $25,000.00, based upon a recovery of $125,000.00, was upheld by this Court, over the objections of a creditor, in *In re Barceloux,* supra.

An allowance of $55,000.00 was increased to $90,000.00, over the objections of some creditors, in *In re Owl Drug Co.,* supra, *although the attorneys brought absolutely nothing into the estate.*

> A rate of $25.00 per hour, as used by the Referee, was held to be fair and reasonable 14 years ago, over the objections of a creditor, in *In re Lustrom Corp.* (1952), 7 Cir., 196 F.2d 975.

According to a footnote in *In re Dole Company* (1965), 244 F.Supp. 751, 757 (D.C. Maine), Judge Wyzanski of the United States District Court for the District of Massachusetts recently said, in an unreported opinion, to-wit:

> "Recent litigation in this Court indicates that a senior lawyer of marked ability and specialized experience in bankruptcy doing the regular work of his calling may reasonably charge in the range of $30 to $40 per hour."

A case that is particularly in point and which warrants special attention is *In re Seed Marketing Association* (1964), supra. It re-affirms the three propositions which go to the heart of this appeal:

(1) It stands for the proposition that the recommended minimum fee schedule of the bar association of the particular locality should be considered in the determination of an appropriate fee. (It is interesting to note that in that case, the Referee's initial allowance, which was increased by the reviewing Court, was based upon a rate well in excess of the recommended minimum fee.[20] There are other cases to the same effect. *In re Dole Company* (1965), supra.)

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[20]In the case at bar, the award of the Referee averages out to an hourly rate of $19.00, of which $9.00, according to the testimony of appellant, is directly attributable to his overhead. (T.P. 51.) The minimum hourly rate prescribed by the Maricopa County Bar Association is $30.00. Referee's Finding of Fact No. 6, Appendix, p. vi.

(2) It stands for the proposition that a reviewing Court will, under appropriate circumstances, increase the award of a Referee. (This is, of course, not unique to that case alone. Cf. *In re Osofsky* (1931), 50 F.2d 925 (D.C. N.Y.), which was cited with approval by this Court first in *In re Barceloux,* supra, and more recently in *Sampsell v. Monell,* supra. Cf. also, *Monaghan v. Hill* (1944), 9 Cir., 140 F.2d 31, a non-bankruptcy case, where an award of $12,500.00 was ordered by this Court to be increased to not less than $50,000.00.)

(3) It stands for the proposition that the economy doctrine is not punitive in nature and, its limitations notwithstanding, that bankruptcy practitioners "must be adequately and fairly compensated if they are to be expected to lend their skill and talent to this area of the law."

One of the more prolific and respected writers on this subject, Referee Herzog, suggests this formula, as a rule of thumb, in cases such as the one at bar where substantial assets are brought into an estate by virtue of the efforts of the attorney for the trustee, to-wit:

> ". . . approximately 30% of a modest recovery and approximately 20% of a larger recovery—to be varied by time necessarily consumed, intricacy of the problem, opposition encountered and skill required and applied—this added to reasonable compensation for the professional services rendered other than in connection with recoveries." *In re Seed Marketing Association,* supra, p. 821.

Even under this formula, the $7,500.00 award of the Referee is grossly unfair and inadequate, in that 30%

of the $30,500.00 actual cash which was brought into the estate as the direct result of appellant's efforts would in itself warrant a fee in excess of $9,000.00. If one were to add to this amount the reasonable value of the services rendered by appellant in regard to the obtaining of the waiver and/or withdrawal of valid claims aggregating in excess of $75,000.00—thereby enhancing the available dividend distributions to the remaining creditors by approximately $15,000.00—and the reasonable value of his routine services rendered to the trustee, then the total would be much more than the requested fee.

Before concluding, brief mention should be made of *Official Creditors' Committee of Fox Markets, Inc. v. Ely* (1964), 9 Cir., 337 F.2d 461. There, it will be recalled, after an exhaustive review of the authorities, this Court concluded that the fee of the attorneys for the trustee should be reduced to the equivalent of $74.00 per hour. In contrast, the fee requested herein by appellant is merely $30.00 per hour.

CONCLUSION

Based upon the foregoing principles, criteria, and authorities, it is respectfully submitted that the award of appellant be increased to the amount prayed for.

Dated, Phoenix, Arizona,
March 10, 1967.

Respectfully submitted,
FENNEMORE, CRAIG, ALLEN & MCCLENNEN,
By DANIEL T. BERGIN,
Attorneys for Appellant.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DANIEL T. BERGIN.

(Appendix Follows)

Appendix

Appendix

In the United States District Court
for the District of Arizona

In Bankruptcy No. B-6701-Phx.

In the Matter of
Double Seven Corporation,
Bankrupt.

SEPARATE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON PETITIONS FOR ATTORNEY'S FEES

At Phoenix, in said District, this 17th day of September, 1965.

This matter having come before the Court for hearing on September 10, 1965, at the regularly noticed final meeting of creditors, on the Petitions of Henry Jacobowitz for allowance of attorney's fees for services rendered by him, first to the receiver and then to the trustee of this estate,

Now upon the said Petitions of Henry Jacobowitz and upon all the proceedings had before me at said hearing, the Court does hereby find the facts and states separately its conclusions of law thereon and directs the entry of judgment as follows:

Findings of Fact

1. That all the allegations in the Petitions of Henry Jacobowitz pertaining to the allowance of his attorney's fees are true as stated, including, among other things, that he has successfully prosecuted in behalf of the estate, four plenary actions, which enhanced the assets of this estate by cash in the sum of $30,500.00, and by an additional sum of $15,000.00 or so, by reason of obtaining the withdrawal and the waiver of certain creditors' claims aggregating in excess of $75,000.00.

2. That the total fee of $11,410.00 as prayed for by petitioner is a reasonable sum for the services rendered by him, based upon the value of such services in this community when rendered in ordinary civil proceedings.

3. That a different standard applies in bankruptcy proceedings.

Conclusions of Law

Based upon the foregoing findings, the Court sets the fee of petitioner at $7,500.00.

Now, Therefore, It Is Ordered that the said petitioner be, and he hereby is, allowed the sum of $7,500.00, plus his expenses, and the said sum together with his expenses, less advances, is hereby ordered to be paid.

/s/ Hugh M. Caldwell
Referee in Bankruptcy

In the United States District Court
for the District of Arizona

October Session — At Phoenix

Honorable Walter E. Craig, United States District Judge, Presiding

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B-6701—Phx.

In the Matter of
Double Seven Corporation,
Bankrupt.

MINUTE ENTRY
of November 8, 1965
(Phoenix Division)

Petition of Henry Jacobowitz for Review of Referee's Order is called for hearing.

The Trustee, Tom Roof and the Petitioner Henry Jacobowitz are present. Said Petition for review is argued by Mr. Jacobowitz.

It Is Ordered that the Referee's Order of September 17, 1965, is set aside with respect to attorneys fees in this matter and that the attorney for the trustee herein be paid the sum of $11,410.00 as prayed for, counsel to prepare formal order.

In the United States District Court
for the District of Arizona

B-6701—Phx.

In the Matter of
Double Seven Corporation
Bankrupt.

SUPPLEMENTARY FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON PETITION FOR ATTORNEY'S FEE

At Tucson, in said District, on the 29 day of June, 1966.

This matter having been remanded to this Court by the Hon. Carl A. Muecke, Judge of the United States District Court, for further testimony and for amplification of the original Findings of Fact, and a special hearing having been held on this matter on January 14, 1966, at which time extensive testimony was adduced, now the Court does hereby find, once again, the facts and states separately its conclusions of law thereon and directs the entry of judgment as follows:

FINDINGS OF FACT

1. That all the allegations of the petitioner, Henry Jacobowitz, as contained in his two petitions pertaining to the allowance of his attorney's fees, are true as stated, including, among other things:

(a) That over a period of more than three years he expended approximately three hundred forty-two (342) hours, plus four (4) full days of trial time before the United States District Court, in plenary proceedings, in performing legal services for the estate;

(b) That he successfully prosecuted, in behalf of the estate, four plenary actions, one of which was tried to a jury, as a result of which he enhanced the assets of this estate by cash in the sum of $30,500.00;

(c) That the defendants in the plenary proceedings were ably represented by prominent members of the local Bar and that the recoveries were difficult, not only because they involved intricate questions of law, but because the records of the bankrupt were inadequate and in many instances completely wanting and the trustee, as is often the case in proceedings of this nature, had to rely, in main, on the testimony of the bankrupt whose interests were contrary to those of the trustee, and upon the testimony of the defendants on cross-examination;

(d) That he obtained the withdrawal and waiver of certain creditors' claims aggregating in excess of $75,000.00 thereby increasing the amount to be distributed pro rata among the remaining creditors by approximately $15,000.00.

2. The petitioner exhibited great skill in meeting the intricate and difficult legal propositions encountered.

3. The trustee herein, himself an attorney, testified that the fee prayed for by the petitioner is reasonable.

4. The Creditors' Committee recommends the allowance of the fee as prayed for.[1]

5. The collective expert testimony of the attorneys who testified herein, all experienced and knowledgeable in this field, is to the effect that the fee as prayed for is reasonable and, in fact, on the low side.[2]

6. The minimum fee recommended by the Maricopa County Bar Association for work of this nature is $30.00 per hour, plus $250.00 per day in Court and the fee requested by applicant is predicated upon these rates.

7. The total recovery herein amounts to $61,269.15; total fees and other administrative expenses as requested amount to $23,602.36, or 38.5% of the recovery; the total fees and other expenses allowed, including petitioner's fee in the amount of $7,500.00, total

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[1]In this regard, the Chairman of the Creditors' Committee, Ted F. Warner, an attorney and who himself represents almost 80% of the creditors of this estate, testified that the fee as prayed for is most reasonable, and that it is consistent with the minimum fee schedule as prescribed by the Maricopa County Bar Association. He also recommends that the fee be allowed (See Transcript of Proceedings of January 14, 1966, pp. 1-17)

[2]In this regard, Mr. Henderson Stockton, a practitioner of more than 53 years, with a great deal of experience in this field, after likening the recoveries herein to that of "going down into the bottom of the ocean and finding an old sunken ship and bringing out the gold that's stored there," testified upon personal knowledge of the facts and the questions of law that existed in these proceedings that a minimum fee of $15,000.00 would be reasonable (T.P. 32); Mr. Allan K. Perry, also a practitioner of many, many years, 46 years, with extensive experience in this field, testified that a reasonable fee would be $15,000.00 (T.P. 25). Mr. William H. Gooding, now a Judge of the Maricopa County Superior Court, testified that a reasonable fee would be between $13,000.00 and $15,000.00 (T.P. 20). Mr. Daniel T. Bergin, a partner in the law firm of Fennemore, Craig, Allen & McClennen, testified that a reasonable fee would be $13,000.00.

$16,789.98, or 27.4% of the recovery. Cases of this size closed throughout the United States during the fiscal year 1965 were administered for a cost averaging 19.9% of the recovery, according to figures recently released by the Administrative Office of the United States Courts; costs for previous years range from 18.4% to 20.7%.

CONCLUSIONS OF LAW

I.

The total fee of $11,410.00 asked by petitioner would be a reasonable sum for like services rendered by an attorney in private employment according to schedules of fees as recommended by the Maricopa County Bar Association.

II.

The amount of compensation allowable in bankruptcy proceedings is not measured by the amount which counsel would have received for the same services in private employment.

III.

The "economical spirit of the Bankruptcy Act" demands that an attorney be paid in bankruptcy matters an amount appreciably less than he could command for similar services in purely private employment.

Now, therefore, after again considering the matter and taking into account the size of this estate and the proportionate amount thereof recovered through the efforts of petitioner, the time expended by him in

dealing with the matters involved, his ability and experience, the difficulty and intricacy of the legal propositions determined, the skill employed by petitioner, the opposition met, the opinions evidenced touching the reasonableness of the fee requested, all in the light of the limitation of the "economical spirit of the Bankruptcy Act" and the total costs incurred in the administration of the estate as related to the size thereof,

IT IS ORDERED that the previous allowance of $7,500.00 to the petitioner, plus expenses, remain in full force and effect.

Hugh M. Caldwell,
Referee in Bankruptcy.

In the United States District Court
for the District of Arizona

B-6701—Phoenix

In the Matter of
Double Seven Corporation,
Bankrupt.

ORDER

The petition for review of the Order of the Referee in Bankruptcy, dated June 29, 1966, having been argued and submitted, and the Court having duly considered the same,

It Is Hereby Ordered that the Order of the Referee in Bankruptcy dated June 29, 1966 is affirmed with the following modifications:

1. The first paragraph of Page 4 shall be amended to read:

> "The amount of compensation allowable in bankruptcy proceedings is not measured by the amount which counsel would have received for the same services in private employment but can be and frequently is less. The amount of compensation ordered by the Court depends on the circumstances of each case."

2. The second paragraph on Page 4 shall be deleted entirely.

Accordingly, the Order of the Referee in Bankruptcy under Review is affirmed with modifications.

Dated this 23rd day of August, 1966 at Phoenix, Arizona.

C. A. Muecke
United States District Judge

Copies of the foregoing
mailed this 23rd day of
August, 1966 to:
Hugh M. Caldwell, Referee in Bankruptcy
Henry Jacobowitz, Attorney for Trustee